(5)

No. 88-1640

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, ET AL., PETITIONERS

v.

DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, on the record presented, erred in upholding the decision of the Attorney General of the United States approving an application filed by *The Detroit Free Press* and *The Detroit News* for a joint newspaper operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 166a-197a) is not yet reported; the opinions filed in connection with the denial of the petition for rehearing (Pet. App. 198a-211a) are also not yet reported. The opinion of the district court (Pet. App. 149a-163a) is reported at 695 F. Supp. 1216. The decision of the Attorney General (Pet. App. 136a-147a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. A petition for rehearing was denied on February 24, 1989 (Pet. App. 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1910, a substantial percentage of the metropolitan newspapers in the United States have failed. As a result of this trend, a large majority of American communities are currently served by single newspapers. See H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3 (1970). In the 1930s, newspapers began to form "joint operating arrangements" (JOAs) to combat the prospects of financial ruin. Under the typical JOA, each newspaper reduced costs by combining the business aspects of publishing, but retained independent editorial and news staffs and policies. This mechanism proved to be successful in saving a number of newspapers. Indeed, by 1966, 22 such joint operating arrangements existed in the United States. *Id.* at 3-5.

In *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969), however, the Court held that the JOA between the two newspapers serving Tucson, Arizona, constituted an illegal merger under the Clayton Act, and involved prohibited price fixing, profit pooling, market allocation, and monopolization under the Sherman Act. In so holding, the Court strictly applied the "failing company" doctrine, which provides a defense to otherwise illegal business agreements when one of the firms involved is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. *Id.* at 136-139.

Congress acted swiftly to overturn the *Citizen Publishing* decision in 1970 by enacting the Newspaper Preservation Act (Act), 15 U.S.C. 1801 *et seq.* Congress recognized that unique economic forces affecting the newspaper industry called for specific federal action to preserve "[f]inancially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous and unpopular stands on public issues * * *." S. Rep. No. 535, 91st Cong., 2d Sess. 3 (1969); see *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), cert. denied, 464 U.S. 892 (1983). To accomplish this goal, Congress expressly permitted newspapers to enter into joint business operations before they reach the point of dire financial distress required by *Citizen Publishing.*

The Act authorizes the Attorney General to approve a new JOA if one of the newspaper applicants is a "failing newspaper" and approval of the JOA "would effectuate the policy and purpose of this [Act]." 15 U.S.C. 1803(b). The Act further defines a "failing newspaper" as one that "regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). The Act provides only a limited exemption from federal antitrust laws.[1] Newspapers entering into JOAs must maintain separate "editorial and reportorial staffs" and independent "editorial policies," 15 U.S.C. 1802(2), and may not engage in "any predatory pricing, any predatory practice, or any other conduct * * * which would be unlawful under ~~a n y~~

[1] The Act further provides that a JOA entered into before July 24, 1970 (the effective date of the statute) may remain in effect "if at the time at which such arrangement was first entered into, * * * not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication * * *." 15 U.S.C. 1803(a).

any antitrust law if engaged in by a single entity," 15 U.S.C. 1803(c). The Act, however, does permit newspapers to take joint action with regard to printing, time and method of publication, production, advertising and circulation rates, distribution and solicitation, and revenue distribution. 15 U.S.C. 1802(2).[2]

2. In May 1986, *The Detroit Free Press* and *The Detroit News* filed an application with the Attorney General for approval to work under a JOA. That application identified the *Free Press* as the newspaper in probable danger of financial failure.[3] The proposed JOA provides that the *Free Press* will publish a weekday morning edition and the *News* will publish a separate weekday afternoon edition; one edition will be published on Saturday and Sunday, "with each paper assuming separate editorial and news responsibilities" (Pet. App. 115a (footnote omitted)). The two newspapers will maintain separate editorial and reportorial staffs, but will form a "partnership * * * which will control all of the business, commercial, and production aspects of publishing" each newspaper (*id.* at 116a).

In July 1986, the Assistant Attorney General for the Antitrust Division recommended against approval at that

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[2] Under the Justice Department's regulations, an application for a JOA will be referred first to the Assistant Attorney General for the Antitrust Division. That official may recommend approving or rejecting the application. Alternatively, he may recommend that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If a hearing is held, the Antitrust Division becomes a party to the administrative proceedings. 28 C.F.R. 48.10(b), 48.11. The administrative law judge makes recommendations to the Attorney General, who then issues the final agency decision concerning the JOA application. 28 C.F.R. 48.13(b).

[3] Knight-Ridder, Inc., owns the *Free Press*; Gannet Co., Inc., owns the *News*. Those firms are the country's largest newspaper groups. Pet. App. 150a.

time, but also suggested that the Attorney General convene an administrative hearing. The Attorney General accepted that recommendation, assigned the matter to an administrative law judge (ALJ), and designated the major relevant newspaper unions and the Mayor of Detroit as intervenors in the proceedings. Pet. App. 1a-3a, 150a-151a, 173a.[4]

3. a. The ALJ held a lengthy hearing and developed the evidentiary record for the Attorney General. That record shows that Detroit is one of the largest newspaper markets in the country, and that the *Free Press* and the *News* have for years competed fiercely in order to become the dominant paper in that market (Pet. App. 139a).[5] As a result of this vigorous competition, in which neither paper has prevailed,[6] both newspapers have low circulation and advertising prices. Both papers have also suffered sizeable operating losses throughout the 1980s. The *Free Press* encountered greater losses and consistently trailed the *News* in circulation and in advertising revenue. The *News*, however, also lost money from adopting market strategies aimed at improving its market position over the long term. *Id.* at 139a-140a.

The record also shows that, unlike the circumstances surrounding past JOA applications, the *Free Press* had not

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[4] The Mayor and the unions originally opposed the JOA. After the *Free Press* management announced in January 1988 that it would close the newspaper if the JOA application were denied, they withdrew that opposition. See C.A. App. 540-553.

[5] It is our understanding that the term "dominant paper," as used by the parties and the ALJ in this case, means simply the paper that leads definitively in advertising revenue and circulation.

[6] In 1976 and again in 1985, Knight-Ridder poured a considerable amount of investment capital into the *Free Press*, hoping to overcome the *News*, which was not then backed by the substantial resources of Gannett (Pet. App. 139a-140a).

yet fallen into a "downward spiral" in circulation toward inevitable failure (Pet. App. 138a).[7] Nevertheless, the *Free Press* lost more than $81 million between 1979 and 1986, and in 1986 alone, the *News* generated $61 million more in advertising revenues than did the *Free Press*. Both newspapers could become profitable if they together raised prices and eliminated discounting. Since neither paper can raise its prices without regard to the conduct of the other, however, neither one is in a position to take unilateral action to gain profitability. *Id.* at 140a-141a.

b. In December 1987, the ALJ recommended against approving the JOA, concluding that the newspapers had failed to show that "losses * * * are traceable to an irreversible market condition which will probably lead to domination and the downward spiral" (Pet. App. 129a). The ALJ noted the current precarious financial condition of the *Free Press*, the testimony of Alvah H. Chapman, the Chairman of Knight-Ridder, that he would recommend closing the paper if the JOA were denied, and the testimony of various Gannett officials that the company would not ease the competitive pressure on the *Free Press* by raising prices at the *News* if the JOA were denied. The ALJ decided, however, that such evidence did not establish an irreversible trend towards market dominance by one of the newspapers. *Id.* at 130a-131a. In his view, "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies

[7] The court of appeals explained the "downward spiral" phenomenon as follows (Pet. App. 171a):

> Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper that is short on advertising, so circulation drops further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure.

* * *" (*id.* at 132a). Under those circumstances, the "free market itself" should be permitted to take its course (*ibid.*).

4. On August 8, 1988, the Attorney General, having "accepted as accurate the fact findings of the Administrative Law Judge, but differ[ing] * * * with his ultimate conclusion as to where those facts lead" (Pet. App. 147a), approved the application for the JOA.

The Attorney General recognized not only the *Free Press*'s significant losses and the substantially greater advertising revenues of the *News*, but also the inability of the *Free Press* to take unilateral action "to restore the paper to a profitable position," and the lack of any "realistic prospect of outlasting the *News*" (Pet. App. 141a). In light of these facts, "the danger of financial failure, if not imminent, certainly seems 'probable' " (*ibid.*). Although noting the absence of the "proverbial 'downward spiral,' " the Attorney General found that "it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no prospect of extricating itself. Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the *Free Press* would have failed long ago." *Id.* at 142a-143a (citations omitted).[8]

[8] In considering the testimony of Alvah H. Chapman, the Chairman of Knight-Ridder, that he would recommend closing the *Free Press* if the JOA were denied, the Attorney General noted that such a "prediction cannot be wholly disregarded" (Pet. App. 144a). As the Attorney General explained (*ibid.*):

> It would be neither counterintuitive nor contradictory for Knight-Ridder to follow just such a course upon concluding, after all these years, that the *Free Press* no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses.

The Attorney General also noted that after the ALJ had issued his recommendation, Knight-Ridder had submitted information confirm-

Turning to the contention that both newspapers could become profitable simply by raising prices, the Attorney General noted first that "the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate" (Pet. App. 143a). He then observed that Gannett had disavowed an intention to raise the *News*'s prices. Although the ALJ had questioned the testimony of Gannett officials on this point, the Attorney General found that "it hardly reflects unsound business judgment" for the *News* to hold to its current pricing strategy "with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination" (*id.* at 143a, 144a). Accordingly, the Attorney General dismissed that objection.

Having found that the *Free Press* was in "probable danger of financial failure" under the Act, 15 U.S.C. 1802(5), the Attorney General determined that approval of the JOA would effectuate the policy and purpose of the Act. He accepted the ALJ's finding that "this is not a situation where the *Free Press* has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement" (Pet. App. 145a). Rather, the record showed that "[k]een competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly—has moved both newspapers into intractable loss positions from which only one, the *News*, now appears to

ing that the company would close the *Free Press* if the JOA were not approved. Because this information was submitted after the administrative record was closed, the Attorney General did not consider it. See C.A. App. 59 n.4 (this footnote was mistakenly omitted from the reprint of the Attorney General's decision contained in the appendix to the petition for a writ of certiorari).

have any reasonable prospect of emerging" (*ibid.*).[9] The Attorney General thus concluded that the purposes of the Act would be served by approving the JOA because a separate editorial voice would be saved in Detroit, "an outcome that does not appear to be in the future otherwise" (*id.* at 146a).

5. Petitioners then filed this action against the Attorney General and the two newspapers in the United States District Court for the District of Columbia. Petitioners challenged the Attorney General's approval of the JOA as violating the Newspaper Preservation Act itself and the Administrative Procedure Act, 5 U.S.C. 706. On cross-motions for summary judgment, the district court upheld the Attorney General's decision. Pet. App. 149a-163a.

As a threshold issue, the district court held that the Attorney General's decision must be reviewed under the "arbitrary and capricious" standard set forth in the Administrative Procedure Act, not the "substantial evidence" test, because the Newspaper Preservation Act itself does not provide for an initial administrative hearing (Pet. App. 153a). Under that deferential standard of review, the court upheld the Attorney General's ruling that a news-

[9] The Attorney General also considered the argument that the newspapers should be denied permisson to work under the JOA because they "openly pursued the JOA option over several years and saw it as a means of avoiding financial failure" (Pet. App. 145a). He found that the marketing strategy adopted by the newspapers had been in place for nearly ten years, and Knight-Ridder's heavy investment in the *Free Press* during that period "belies the notion that it was principally pursuing any end other than market domination" (*id.* at 146a). Under the circumstances, the Attorney General concluded that pursuing a JOA was a reasonable management alternative. In his view, "newspapers cannot be faulted for considering and acting upon an alternative that Congress has created" (*ibid.*).

paper need not show "the traditional downward spiral" in order to qualify as a "failing newspaper" under the Act (*id.* at 155a). Similarly, the court concluded that the Attorney General [illegible]s "presented ample support * * * for his finding that th[illegible]e Press is both 'suffering losses which more than lik[illegible] cannot be reversed' and is in 'probable danger of financial failure' " (*id.* at 156a).

The district court rejected petitioners' contentions that the Attorney General mistakenly concluded that the *News* would not raise its prices if the JOA were denied and that he gave undue weight to the testimony that Knight-Ridder would close the *Free Press* under such circumstances. The court concluded that, on this record, the Attorney General was neither arbitrary nor capricious in determining that the closing of the *Free Press,* given its substantial losses and market position, would not be an illogical course of action. Pet. App. 157a-159a.

Turning to petitioners' argument that the newspapers' allegedly purposeful losses should have disqualified them for approval under the Act, the court accepted the premise of that position, but found that the losses in this case were real and resulted primarily from the newspapers' shared strategy of seeking the dominant position in the Detroit market (Pet. App. 159a-161a). It thus determined that the Attorney General had not acted unreasonably in approving the JOA when "the newspaper's losses are *primarily* the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail" (*id.* at 160a-161a). Here, the record showed that the prospect of a JOA played only a secondary role in the *Free Press*'s strategic decisionmaking (*id.* at 161a).

Finally, the court dismissed petitioners' charge that the Attorney General's decision was internally inconsistent, holding that there can be no such conflict where the Attorney General had accepted only the ALJ's findings of fact, but not the inferences drawn from such facts (Pet. App. 161a-162a).

6. A divided panel of the court of appeals affirmed (Pet. App. 166a-197a). It first found that the "exact meaning of the linguistically imprecise phrase 'probable danger of financial failure' is not apparent from the [Newspaper Preservation Act] or the legislative history" (*id.* at 178a). The court of appeals thus decided to defer to the Attorney General's reasonable reading of the statute, which had been taken from the Ninth Circuit's self-described "commonsense construction" in *Committee for an Independent P-I* v. *Hearst Corp.,* 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983), namely, "[i]s the newspaper suffering losses which more than likely cannot be reversed?" (*id.* at 478); see Pet. App. 175a, 178a-180a. The court acknowledged "the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly" (*id.* at 180a), but concluded that this aid to statutory construction should not be used to overturn a reasonable agency application of the Act to a particular set of facts (*id.* at 180a-181a).

The court of appeals then examined the Attorney General's decision and found it reasonable on the record presented. It accordingly upheld the Attorney General's views that the *News* had obtained a competitive advantage, that the *News* would not likely ease competitive pressure on the *Free Press* by raising prices in the future if the JOA were denied, and that there is a significant probability that the *Free Press* would close in the absence of JOA. Pet. App. 183a-189a. As the court stated, the Attorney General "obviously was concerned that if he gambled on the ALJ's prediction that both newspaper[s] were bluffing, Detroit would lose a newspaper" (*id.* at 187a).

Lastly, the court of appeals concluded that the Attorney General had sufficiently considered the potential problem "that the statute authorizing a JOA creates a self-fulfilling prophesy. Newspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing"—an approved JOA (Pet. App. 189a). Given the facts of this case, with the long history of stiff competition between the *Free Press* and the *News*, the court concluded that the Attorney General had acted reasonably in finding that market success was the principal goal of each newspaper, and that approval of the JOA was therefore within the purposes of the Act. *Id.* at 189a-190a.[10]

7. On February 24, 1989, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc (Pet. App. 198a-199a).[11] Petitioners then filed an application for a stay of the Attorney General's decision pending the filing and disposition of a petition for a writ

[10] Judge Ruth Bader Ginsburg dissented (Pet. App. 191a-197a), concluding that the matter should be remanded to the Attorney General in order to have him explain the different standards governing approval of new and existing JOAs, and to address more precisely whether the two newspapers could actually achieve profitability on their own without the aid of a JOA.

[11] Chief Judge Wald, and Judges Mikva, Edwards, and Ruth Bader Ginsburg dissented (Pet. App. 198a-199a). Chief Judge Wald, joined by Judges Mikva and Edwards, issued an opinion expressing the view that further review was appropriate based on their disagreement with the Attorney General's conclusion regarding the probability that the *News* would not, in the absence of a JOA, provide relief to the *Free Press* by raising its prices (*id.* at 205a-211a). According to the dissent, the Attorney General's conclusion was contrary to "[c]lassic economic principles" (*id.* at 207a), and continued low pricing by the *News* would be "perilously close" to prohibited predatory pricing (*id.* at 209a). Under those circumstances, the dissent favored "perusal by an *en banc* court" (*ibid.*).

of certiorari. On March 3, 1989, the Chief Justice, sitting as Circuit Justice, denied the application for a stay. The next day, petitioners resubmitted the application to Justice Brennan, who granted a stay pending a further order by him or the Court. On March 20, 1989, the Court denied the application for a stay; Justices Blackmun and Stevens dissented.

ARGUMENT

The decision of the court of appeals upholding the Attorney General's approval of the joint operating arrangement is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the decisions below involve an application of the Newspaper Preservation Act to the specific set of facts pertaining to a particular newspaper market in one metropolitan area. Despite petitioners' contrary suggestion (Pet. 13), this case is an unlikely "roadmap" for any newspaper contemplating filing an application for a JOA. Accordingly, further review by this Court is not warranted.

1. a. Petitioners contend (Pet. 13-18) that the court of appeals' decision misapplied the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requiring courts to defer to an agency's reasonable interpretation of a statute Congress has trusted it to administer. Petitioners essentially claim that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to antitrust laws must be narrowly construed.

The court of appeals, however, did not depart from the established *Chevron* framework. The court fully recognized that courts should and often do use canons of con-

struction as intrinsic aids at the first stage of the *Chevron* analysis—determining whether Congress has spoken to the issue in question. These canons may make otherwise ambiguous statutory language clear, and thereby eliminate the need to rely on an agency's interpretation at all. Pet. App. 180a-181a. Following *Chevron,* the court merely held that, when the relevant statutory language has no clear meaning, a court should defer to an agency's reasonable application of the ambiguous statutory language to a particular set of facts. Moreover, the court did not suggest that canons of construction have no role to play at this second stage of the *Chevron* analysis. The court simply reached the unexceptionable conclusion that if the agency has reasonably applied an ambiguous statute to the precise facts before it, the administrative action should not be set aside merely because the agency has not specifically mentioned a canon. See *id.* at 180a-182a.[12]

b. Petitioners further argue (Pet. 14) that the court of appeals' decision conflicts with the only other reported appellate court decision construing the Newspaper Preservation Act, *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 473 (9th Cir.), cert. denied, 464 U.S. 892 (1983), which stated that courts and the Attorney

[12] The court of appeals did suggest that if Congress did not have a specific intent on the issue in question, a court should not insist that an agency resolve the matter by applying a particular canon of construction based on substantive policy presumptions. But that suggestion is entirely consistent with *Chevron.* To insist that an agency resolve a matter solely by reference to a canon that reflects substantive policy presumptions would put the court rather than the agency in the position of resolving the issues left open by Congress. As the court of appeals correctly recognized (Pet. App. 180a (emphasis in original)), "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes."

General, in applying the Act, must be guided by the canon of construction governing application of the antitrust laws. There is, however, obviously no conflict between *Hearst* and this case. The Attorney General explicitly adopted the very reading of the Act set forth by the Ninth Circuit in *Hearst* (see Pet. App. 141a-142a), and nothing in the court of appeals' decision contradicts that approach (see *id.* at 175a).[13]

c. Petitioners also contend (Pet. 15-16) that the court of appeals' decision is at odds with pre-*Chevron* decisions by this Court applying the canon of construction governing application of the antitrust laws. In *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), the Court invoked that canon as an aid in holding that the Federal Maritime Commission's interpretation of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, conflicted with both the structure of the relevant statutory scheme and that statute's legislative history. 411 U.S. at 731-743. In so holding, the Court found that the structure of the statute itself made the proper reading of the statute "undeniably clear" (*id.* at 736). But the Court also confirmed the principle that a reasonable agency construction of a statute will be upheld so long as that construction does not conflict with a discernible statutory mandate or congressional policy, as the Court found it did in that case (*id.* at 745-746). Accordingly, the court of appeals' decision is wholly consistent with *Seatrain Lines.*[14]

[13] Petitioners claim (Pet. 14) that the court of appeals recognized that the Attorney General's reading of the Act was a departure from past practice and inconsistent with the canon of construction upon which they rely. The part of the court of appeals' opinion cited by petitioners (Pet. App. 180a), however, recognizes neither of these points, and we are not aware of any such statements by that court.

[14] In *United States* v. *First City National Bank,* 386 U.S. 361 (1967), also cited by petitioners (Pet. 16), the Court considered the

2. Petitioners also renew their attack on the Attorney General's factual finding, upheld by both the district court and the court of appeals, regarding the likely conduct of the *News* in the absence of a JOA. Specifically, petitioners condemn the Attorney General's finding that the *News* would maintain current low prices as being flatly inconsistent with "classic economic principles" (Pet. 22). It is well settled, however, that this Court ordinarily does not review factual findings that have not been disturbed on appeal. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984). In any event, Congress had no intention of incorporating a particular economic theory into the Act. As the Ninth Circuit correctly pointed out, Congress, in passing this statute, recognized that "unique economic forces operate in the newspaper industry." *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d at 480.[15]

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weight to be given in judicial proceedings to an administrative decision under a statute explicitly providing for *de novo* judicial review. See 386 U.S. at 367-368. Here, by contrast, the Administrative Procedure Act calls for an entirely different standard of review. Accordingly, there is no conflict between this case and *First City National Bank*.

Petitioners' listing of various antitrust statutes (Pet. 16-17) is beside the point. If litigation should arise involving applications of those statutes, courts will look to the statutory language, legislative history, and accepted canons of construction in order to determine their meaning.

[15] Petitioners claim (Pet. 22) that the Attorney General's finding that the *News* will not raise its prices in the absence of a JOA amounts to a conclusion that the paper will engage in illegal predatory pricing. The ALJ himself did not find that the aggressive competitive pricing measures taken by the two Detroit newspapers constituted illegal predatory pricing. See Pet. App. 128a n.303. The determination whether a firm is engaging in predatory pricing involves a complex inquiry. See *Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-1007 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985). Petitioners are wrong in asserting

3. Finally, petitioners assert (Pet. 19-22, 23-24) that the Attorney General's decision amounts to a misapplication of the Act that will allow newspapers in the future easily to qualify for approval of a JOA. In their view, the Attorney General has concluded that a newspaper, in order to obtain a JOA under the Act, must merely show that it has lost money over a period of years and that it will continue to do so. Thus, a newspaper need only slash its prices, forcing its competitor to do the same, and then apply for a JOA after losing money as a result of that self-inflicted price reduction. Petitioners accordingly assert that the Attorney General's decision provides an easy "roadmap" for newspapers to follow in order to qualify for JOAs, and that in so doing it will undermine the purposes of the Act.

Contrary to petitioners' suggestion, the Attorney General's decision cannot be viewed as a convenient guide for obtaining a JOA. The decision did not rely exclusively on one or two easily replicated factors in approving the JOA. The record shows clearly that the Attorney General gave weight to a variety of considerations in approving the

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that the contemplated conduct by the *News* in the absence of a JOA can so surely be labelled as prohibited predatory pricing.

Petitioners also chastise the Attorney General (Pet. 22) for not explaining the difference between the standards to be used when ruling on a new JOA application and those for reviewing an application to continue an existing JOA. See 15 U.S.C. 1803(b). But this case does not present that issue since the newspapers only applied for approval of a new JOA. On this record, the Attorney General had no occasion to issue an advisory opinion regarding the standards applicable for continuation of an existing JOA. Petitioners simply misconceive the Attorney General's decision as announcing some sort of broad rule governing all applications for JOAs, both past and future. See pages 17-19, *infra*.

JOA in this case:[16] (1) the *Free Press* has sustained operating losses each year from 1979 through 1986 totalling $81 million (Pet. App. 141a); (2) those losses have increased each year except 1983 (*id.* at 76a-77a); (3) the *Free Press* would have failed long ago without substantial cash infusions by the newspaper's corporate parent (*id.* at 142a-143a); (4) because of the nature of the Detroit newspaper market, the *Free Press* cannot, by itself, take steps to earn a profit, *i.e.*, the newspaper cannot raise its prices unless the *News* does so, and federal antitrust laws prevent the newspapers from jointly agreeing to raise their prices (*id.* at 141a-142a); (5) the *News* enjoys a significant competitive advantage in advertising and circulation over the *Free Press* (*ibid.*); (6) the corporate parent of the *Free Press* has announced that it will close the newspaper if a JOA is denied (*id.* at 144a); (7) the *Free Press* and the *News* have engaged in fierce competition for approximately 25 years, long before they sought approval for a JOA (*id.* at 15a-19a); and (8) neither improper marketing practices nor mismanagement caused the poor financial condition of the *Free Press* (*id.* at 145a-146a).

On this record, a newspaper in another city could hardly use this case as a guide for obtaining the Attorney General's approval of a JOA. First, the newspaper would need to allege and prove all of the numerous factors listed

[16] Petitioners seek to undercut this point by asserting that "five of the factors cited * * * are all variations on the contentions that the Free Press has sustained losses for many years, that the Free Press could not raise its prices unless the News did the same, and that the papers have been competing for a number of years" (Pet. 22). But it is clear that the Attorney General's decision to approve an application for a JOA depends not on such broad categorical facts as whether a newspaper has "sustained several years of losses and that it cannot unilaterally raise its prices" (Pet. 23), but rather on the particular set of circumstances giving rise to such facts.

above, or their equivalent. Second, even if a newspaper satisfied that evidentiary burden, it would not necessarily receive approval for a JOA, since the Attorney General can disapprove the application if it is inconsistent with the purposes of the Act. See 15 U.S.C. 1803(b). Thus, the Attorney General could deny the application if the record showed that two newspapers had deliberately created operating losses as a means of obtaining a JOA. This could be true even if ultimately obtaining a JOA had *not* been the exclusive goal of the applicant newspapers. See Pet. 24.

Finally, petitioners mistakenly assume that a competing newspaper will automatically agree to a JOA, which may offer profits greater than either paper could expect in a competitive market. There are a variety of additional competitive factors that newspapers must consider before deciding to apply for a JOA, and that the Attorney General may take into account before approving that application. For example, the effects on the particular market involved of a possible third urban newspaper, suburban and national newspapers, and other media such as radio and television must be taken into account. Moreover, newspapers in other cities may enjoy customer loyalty for a variety of reasons not present in Detroit. Consequently, there could be options for unilateral action by some financially troubled newspapers which are not available to the *Free Press*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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